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Nos. 02-1238; 02-1386; 02-1405

In the
SUPREME COURT OF THE UNITED STATES

Attorney General State of Missouri,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents,

Federal Communications Commission
and the United States of America,
Petitioners,

v.

Missouri Municipal League, *et al.*
Respondents,

Southwestern Bell Telephone Company,
Petitioner,

v.

Missouri Municipal League, *et al.*
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Petition for Expedited Declaratory Ruling Regarding the Validity of Section 3.251(d) of the Texas Public Utility Regulatory Act of 1995 Prohibiting Provision of Telecommunications Services by Municipalities, CCB Pol 96-14 (May 20, 1996) 9

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PUB. UTIL. REGULATORY ACT OF 1995, TEX. REV. CIV. STAT. ANN. Art 1446c-O (WEST SUPP. 1996)

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§3.251 8
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TEX. LOCAL GOV'T CODE ANN. (Vernon Supp. 2003)

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TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 2003)

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OTHER AUTHORITIES

Stamp, *Left Behind: The Lack of Advanced Telecommunications Services in Rural America and its Strain on Rural Communities—Policy Options for Closing the Digital Divide*,
7 Drake Journal of Agricultural Law 645 (2002) 5

FCC Report on Deployment of Advanced Telecommunications,
1999 5,6

Carol Keeton Strayhorn, Texas Comptroller of Public Accounts, *Limited Government, Unlimited Opportunity*, "Increase the Availability of Broadband Interest Services in Rural Areas," (Jan. 2003) 12

Public Utility Comm'n of Texas, 1995 Report to the 74th Texas Legislature, *Scope of Competition in Telecommunications Market Report* (Jan. 1995) 5

Public Utility Comm'n of Texas, Report to the 77th Legislature, *Availability of Advanced Services in Rural and High Cost Areas* (Jan. 2001) 12

Public Utility Comm'n of Texas, 2003 Report to the 78th Texas Legislature, *Scope of Competition in Telecommunications Markets In Texas* (Jan. 2003) 13

National Rural Electric Cooperative Association, *People-Their Power, The Rural Electric Fact Book* (1980) 14, 15, 18

R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* (1986) 14

D. Nye, *Electrifying America* (1990) 18

American Public Power Ass'n, Testimony before Senate Committee on Commerce, Science and Transportation on S.1822, 103d Cong., 2d Sess. 351, 355-356 (1994) 20

Telecommunications Reports Daily, *Officials: Broadband Investments Pay Off for Localities* (Sept. 26, 2003) 20

Light Reading-Networking the Telecom Industry, *FTTH Council Applauds Supremes* (June 25, 2003) 20

Broadband Reports.com, *Bells Absent (so far) in Fiber Push* (Oct. 7, 2003) 21

CITY OF ABILENE, TEXAS AND TEXAS COALITION OF CITIES FOR UTILITY ISSUES BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The City of Abilene, Texas ("Abilene" or "City") and the Texas Coalition of Cities for Utility Issues ("TCCFUI") (together "*Amici*") respectfully submit this Brief *Amici Curiae* in support of Respondents.[1] Abilene and TCCFUI urge affirmation of the Eighth Circuit's decision.

INTEREST OF *AMICI CURIAE*

The City of Abilene, Texas is a "home rule city" under the Constitution and laws of the State of Texas with a population of approximately 116,000. Abilene is located 120 miles west of Fort Worth, Texas, the closest major metropolitan area. It is Abilene's August 15, 1996, petition for preemption to the Federal Communications Commission ("FCC" or "Commission") which is the subject of *City of Abilene, Texas v. Fed. Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999). Accordingly, Abilene offers firsthand experience in how the D.C. Circuit's opinion thwarts Congress' determination that the nation's telecommunications needs are best served through competition. Abilene's interest is, and always has been, to ensure that its citizens and businesses have access to technologically-advanced telecommunications services.

TCCFUI[2] is a coalition of approximately 110 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. TCCFUI monitors the activities of the Texas Legislature, the Public Utility Commission of Texas, the Texas Railroad Commission, and the Federal Communications Commission on utility issues of importance to cities. One of the principal purposes of TCCFUI is to ensure that the citizens of Texas enjoy quality

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[1] No person or entity other than *Amici* have made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief and letters of consent have been filed with the Clerk of the Court.

[2] A list of TCCFUI's member cities is found on Attachment A.

utility service, including telecommunications services. Members of TCCFUI compete nationally and internationally for business development. TCCFUI members understand that up-to-date telecommunications service is essential to the efficient provision of municipal services, economic development, the ability to provide progressive educational and employment opportunities, and to achieve a high quality of life. Many members of TCCFUI own and operate an electric system and are in a perfect position to provide telecommunications services. TCCFUI supports the efforts of Abilene and similarly-situated municipalities to bring the benefits of competition in the telecommunications arena to all Americans.

SUMMARY OF THE ARGUMENT

This case is about whether the laudable purposes of the Telecommunications Act of 1996 ("the 1996 Act") will be accomplished and whether ***all*** Americans will enjoy the benefits of competition in the telecommunications field as envisioned by Congress. The Missouri statute at issue, like that enacted in Texas, does nothing less than protect the incumbent local exchange company by banning entry of potential competitors. In many instances, without participation by the local government, there will be no lower prices, upgraded infrastructure, or innovation typically associated with competition. Especially vulnerable are smaller, rural communities. The "digital divide" between rural and urban areas is quite real. The Court's decision in this case will either close that gap or widen the divide.

The Eighth Circuit's construction of Section 253(a) of the 1996 Act promotes competition in the telecommunications market and results in the deployment of advanced telecommunications services in those areas unserved or under-served by private companies by allowing local governments to identify the community's telecommunications needs and provide the necessary investment to meet those needs. In those states without comprehensive bans on local participation, hundreds of cities and towns are planning and working to modernize systems and provide the same communication services enjoyed by residents and businesses in larger, urban areas.

In contrast, the results are in on the D.C. Circuit Court's opinion in *City of Abilene, Texas v. Fed. Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999), upholding the Texas law

preventing municipalities from competing in the telecommunications field. Abilene and other Texas cities can only watch as communities in other states upgrade their telecommunications infrastructure and surge ahead in the fierce competition for businesses and commerce. Abilene's vision for an up-to-date telecommunications system was dashed by the D.C. Circuit Court's opinion.

The importance of a modern telecommunications system to a community, ignored by the D.C. Circuit, cannot be overstated. The availability of enhanced telecommunications services is essential to the provision of municipal services and to the economic viability of a community. States and municipalities often compete for industry and business. Business location decisions may be determined by whether there exists an up-to-date telecommunications infrastructure and by the quality of the local educational system. The educational system of the community may be judged on whether enhanced telecommunications services are available in the schools. With the current emphasis on security and emergency preparedness, the essential nature of modern telecommunications goes beyond economics.

History teaches us that public entities can be critical players in the provision of essential services. Early in the development of the electric utility industry, the for-profit companies concentrated on bringing the miracle of electricity to the profitable urban areas of the United States. For nearly half a century, the rural areas of our country were literally left in the dark by the private companies. Only through the formation of local member-owned cooperatives and municipally-owned electric systems was this essential service brought to the small cities and towns, farms, and ranches of America. Congress, in promulgating the 1996 Act, was well aware of the history of the electric industry and perfectly understood the important role local governments can play in bringing enhanced telecommunications services to smaller towns and rural areas.

Surely, Congress intended that ***all*** Americans benefit from the competition promoted in the Telecommunications Act of 1996. Affirmation of the Eighth Circuit's decision will bring that goal closer to reality for all Americans.

ARGUMENT

I. Petitioners' Interpretation Of The Telecommunications Act Of 1996 Ensures That Many Americans Will Not Enjoy The Benefits Of Competition Envisioned By Congress.

A. The 1996 Act Promotes Competition.

The purpose of the Telecommunications Act of 1996 is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunication technologies."[3] The FCC has correctly stated the overriding goals of the Act:

> In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in *all* telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.
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> * * *
>
> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets.* The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.*[4]

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) codified at 47 U.S.C. § 157 (2000).

Amici agree with the FCC that Congress intended to promote competition in all telecommunications markets. The opening of all markets to all providers was the fundamental intent of Congress. But state laws restricting public providers from entry as competitors ensures that these goals will not be accomplished. Soon, eight years will have passed since the 1996 Act was signed into law on February 8, 1996. For many Americans, lower telecommunications prices, increased innovation, and deployment of advanced technologies remain but a dream. It is easy to see that in those states that have banned municipal entry into the marketplace, including Texas and Missouri, Congress' goals will not be realized.

It cannot be legitimately disputed that there exists what has been referred to as a "digital divide" between densely populated urban areas and sparsely populated rural areas in the availability of advanced telecommunications services.[5] The cause for such divide is not at all complicated. It is a matter of economics. Incumbent and competitive local exchange companies must anticipate a target rate of return before investment in expensive infrastructure is undertaken. Smaller, rural towns oftentimes cannot provide the required return.[6] In those states where incumbent local exchange

[4] *In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶ 1 (rel. Aug. 8, 1996) (emphasis added).

[5] *See, e.g.,* Stamp, *Left Behind: The Lack of Advanced Telecommunications Services in Rural America and its Strain on Rural Communities—Policy Options for Closing the Digital Divide*, 7 Drake Journal of Agricultural Law 645 (2002).

[6] In its 1995 report to the Texas Legislature, the Texas PUC reported that "...there is little evidence of competition for the provision of most local telephone services in rural Texas. LECs supply the majority of all services. Evaluation of potential competition suggests that LECs will continue to have a similar degree of dominance in the near future." According to the PUC, "...competitors for most services have little incentive to provide services to rural Texas at this time. This is especially true given that the cost of providing service is more expensive in rural areas because of low population densities." 1995 Scope of Competition in Telecommunications Market Report at 44. *See also,* FCC Report on

companies have been protected by laws prohibiting municipalities from participating in the telecommunications market, there is no other option. Those urging affirmation of the D.C. Circuit Court of Appeals in *City of Abilene, Texas v. Fed. Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999) fail to consider that opinion's adverse effect on competition and, therefore, on the economic development of communities located outside the large urban areas.

B. The D.C. Circuit's Decision Is Anti-Competitive.

The anti-competitive affect of the D.C. Court's opinion is now a matter of history. The experience of *amicus* Abilene, brings home the point. In 1995 the Mayor's Task Force on Technology was formed to explore the technological needs of Abilene. It was a broadly based committee comprised of local and regional governmental officials, citizens, civic organizations, leaders in education, and businesses. It was local government at its best. The mission of the Task Force was "[t]o assure Abilene's place on the Information Superhighway."[7] As a result of the work of the Mayor's Task Force, Abilene viewed the construction of a modern

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Deployment of Advanced Telecommunications, 1999, Statement of Chairman Kennard:

> Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is -- the network of our national community...We must always be looking for ways to remove barriers to investment and to promote competition. *I am particularly concerned about deployment in rural areas and in inner cities.* Given the early stage of deployment of advanced telecommunications generally, it may seem difficult to discern the extent of the disparity between rural and urban areas. *But today's Report suggests that in the very short term, demand for high bandwidth will really start to take off. My concern is that a geometric increase in demand may be mirrored by a geometric increase in the urban-rural disparity.* (Emphasis added).

[7] Report of Mayor's Task Force on Technology, September 26, 1996.

telecommunications infrastructure as a pathway to the City's economic vitality, similar to the manner in which highways and roads in the past were considered the cornerstones for economic growth of a city. Abilene had a vision to "enrich the lives of all area citizens, businesses, governmental entities, and schools by empowering them to use world-wide knowledge bases."[8] Abilene's plan to upgrade the telecommunications infrastructure was to benefit schools, libraries, healthcare facilities, and businesses. The local exchange company, SWB, was not willing to undertake the needed improvements to meet the City's needs. The City was prepared to work with the private sector to design, install, and maintain state of the art facilities to meet these goals. But Texas law prevented Abilene's entry into the market and quashed any effort to contract with a private sector company. The D.C. Circuit upheld the FCC's refusal to preempt Texas' onerous statute.[9]

Petitioners would have this Court affirm the reasoning of the D.C. Circuit in *City of Abilene*. The most striking feature of the D.C. Circuit's opinion is its complete silence on the statutory objectives and congressional policies that furnish the context for this controversy. The Court in *City of Abilene* missed the big picture. It was too busy listening for Congress' "tone of voice"[10] to consider the broad, important objectives of the 1996 Act. Consequently, Abilene's efforts to provide modern technology for its citizens was frustrated and in most small towns, competition remains non-existent. Rates have not been lowered in many rural towns. There has been no investment in an upgraded infrastructure in many cities and towns. Affirmation of *City of Abilene* means Congress' policies will not be implemented and its goals will remain out of reach.

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[8] *Id.*

[9] It should be noted that the D.C. Court failed to take into consideration that PURA 95 is to be construed "...so as not to conflict with any authority of the United States." PURA 95, § 1.406.

[10] *City of Abilene v. Fed. Communications Comm'n* at 52.

C. PURA 95 Is A Barrier To Competition.

In 1995, Texas enacted legislation purportedly designed to promote competition in telecommunications. The Public Utility Regulatory Act of 1995[11] ("PURA 95") announced that:

> ...it is the policy of this state to promote diversity of providers and interconnectivity and to encourage a fully competitive telecommunications marketplace while protecting and maintaining the wide availability of high quality, interoperable standards based telecommunications services at affordable rates...[12]

The Texas Legislature said it desired to "...foster, encourage, and accelerate the continuing development and emergence of a competitive and advanced telecommunications environment and infrastructure."[13] However, at the urging of politically powerful Southwestern Bell Telephone Company, one of the Petitioners in the instant case and the incumbent local exchange company in Abilene, the Legislature incongruously inserted a provision intended to protect Southwestern Bell from competition:

> Sec. 3.251
>
> (d) A municipality may not receive a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority under this Act. In addition, a municipality or municipal electric system may not offer for sale to the public, either directly or indirectly through a telecommunications provider, a service for

[11] The Public Utility Regulatory Act has been extensively modified over the years. The sections of PURA 95 of interest to us here are: § 3.001 (Act of May 12, 1995, 74th Leg., R.S., Ch. 231, § 7, 1995 Tex. Gen. Laws 2018 repealed by Act of May 8, 1997, 75th Leg. R.S., Ch. 166, § 1, 1997 Tex. Gen Laws 792); and § 3.251 (Act of May 12, 1995, 74th Leg., R.S., Ch. 231, § 23, 1995 Tex. Gen. Laws 2032 repealed by Act of May 8, 1997, 75th Leg., R.S., Ch. 166, § 1, 1997 Tex. Gen. Laws 828).

[12] PURA 95, § 3.001.

[13] *Id.*

> which a certificate is required or any non-switched telecommunications service to be used to provide connections between customers' premises within the exchange or between a customer's premises and a long distance provider serving the exchange.[14]

The Texas statute, similar to the Missouri statute at issue, provides for a blanket prohibition against entry into the telecommunications market by private corporations in two respects. First, the Texas statute denies municipalities the opportunity to contract with for-profit corporations to provide telecommunications services to a city and its citizens. Second, the statute does away with a city's ability to act in the same manner as a private corporation in performing the proprietary function of providing telephone service.

Abilene believed the Texas statutory provision to run afoul of § 253 of the 1996 Act, considered itself to be an "entity" and petitioned the FCC for an order to that effect. At the same time it was considering Abilene's petition, the FCC also had before it the petition of ICG Communications ("ICG"), a Denver-based private company providing telecommunications services.[15] ICG, too, sought a declaratory order preempting the Texas statute. ICG had entered into a joint venture with the City of San Antonio, Texas, to construct a telecommunications network. A portion of the network was to be used by the City for purposes of its electric utility and the balance was to provide telecommunications services for sale to the public. It seemed to be the perfect blend of government and private business which would make efficient use of San Antonio's facilities while bringing advanced telecommunications services to the residents and businesses of San Antonio.[16]

[14] PURA 95, § 3.251(d). This section is now codified in PURA §§ 54.201 and 54.202 (Vernon 1998).

[15] *Petition for Expedited Declaratory Ruling Regarding the Validity of Section 3.251(d) of the Texas Public Utility Regulatory Act of 1995 Prohibiting Provision of Telecommunication Services by Municipalities*, CCB Pol 96-14 (May 20, 1996).

[16] In the *Abilene* case, the City of Garland, Texas pointed out to the FCC that 75 municipalities in Texas own and operate their own electric utility and provide retail electric service to over 2.5 million Texans. Garland

But, the Texas Attorney General rendered an opinion that the San Antonio-ICG agreement was prohibited by § 3.251(d), PURA 95. The Attorney General all but admitted that stifling competition was the prime motivation in adoption of the Texas statute by quoting the sponsor of § 3.251(d):

> Members, right now, cities are in the business of regulating these utilities. They own the rights-of-way. Franchise fees are paid to them. We don't think it . . . fair for them to be able to also enter into the businesses.[17]

Even if this Court amends 47 U.S.C. § 253(a) to read "any *private* entity" as requested by Petitioners, the Texas statute has already prevented the provision of telecommunications services by a private entity, ICG.

Not only is the Texas ban anti-competitive, it is based on a misunderstanding of Texas and federal law. Regulation of the right-of-way and promulgation of franchise fees does not create the "unfair" situation feared by the bill's sponsor. While municipalities certainly do have authority to manage the public right-of-way and collect franchise fees, such authority is subject to

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contended that many of these cities are "uniquely positioned to enter into the field of telecommunications services, either as direct providers or in partnership with providers." FCC, CCB Pol 96-19, *Comments of City of Garland, Texas in Support of Petition of City of Abilene, Texas for Expedited Declaratory Ruling* (Oct. 10, 1996) at 3.

[17] Debate on H.B. 2128, on the floor of the Senate, 74th Leg. R.S. (May 12, 1995), Statement of Senator Sibley quoted in Op. Tex. Att'y Gen. No. DM-391 (1996). This asserted "conflict of interest" ignores the fact that municipalities in Texas were authorized, for decades, to provide telecommunications services and charge franchise fees to competing telephone companies. Article 1175(13), Vernon's Art. Civ. Stat. Numerous municipalities in Texas own and operate electric systems that compete with investor-owned electric utilities while retaining the ability to assess franchise fees on competing firms. No court has determined this arrangement to be a conflict of interest. There is no danger that the provision of telephone service by a city will result in a monopoly as the Texas Constitution prohibits such monopolies. Vernon's Ann. Tex. Const. Art. I, § 26 ("monopolies are contrary to a free government, and shall never be allowed...").

both Texas and federal non-discrimination requirements. Cities are to apply right-of-way regulations and collect fees in a competitively neutral manner.[18] The FCC correctly ruled in the *Abilene* proceeding that the issue of the regulator becoming a competitor "can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition."[19]

Moreover, the Texas statute prohibits entry of municipalities into the telecommunications market even when such municipalities are acting as private corporations. Most cities and towns in Texas with populations exceeding 5,000 are "home rule" cities created under the Home Rule Amendment to the Texas Constitution.[20] A home rule city is authorized by the State Constitution to amend its charter in any manner, consistent with the Constitution and the general laws of Texas. A home rule city need not look to the Legislature for a grant of power to act because such power is provided by the Constitution.[21]

In Texas, the functions of a city are considered governmental or proprietary.[22] A governmental function is legislative in nature and may not be delegated or bartered away.[23] There are no similar restrictions an proprietary functions:

> In the exercise of its proprietary or business functions, however, such as those which it exercises when it enters into a contract for the

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[18] *See,* the 1996 Act, 47 U.S.C. § 253(c); TEX. LOCAL GOV'T CODE § 283.001(c) (Vernon Supp. 2003); *AT&T Communications of the Southwest v. City of Dallas, Tx.*, 8 F. Supp. 2d 582, 586 (N.D. Tex. 1998), *vacated on other grounds*, 243 F.3d 928 (5th Cir. 2001) (city without authority to impose conditions unrelated to telecommunications providers' use of the city's rights-of-way); *AT&T Communications of the Southwest, Inc. v. City of Austin, Tx.*, 975 F. Supp. 928 (W.D. Tex. 1997).

[19] *In the Matter of City of Abilene*, FCC 97-346, Order at §190 (Oct. 1, 1997).

[20] Vernon's Ann. Tex. Const. Art. XI, §5 (Vernon 1993).

[21] *Rose v. City of La Porte*, 386 S.W.2d 782, 785 (Tex. 1965).

[22] *See, City of Crosbyton v. Texas-New Mexico Utilities Co.*, 157 S.W.2d 418, 420 (Tex. Civ. App.-1941, writ ref'd w.o.m.); *see also, City of Robstown v. Barrera*, 779 S.W.2d 83, 85 (Tex. App.-Corpus Christi 1989, no writ).

[23] *City of Crosbyton* at 420.

> private interests of its own inhabitants or of itself, a municipal corporation is limited by no such restriction. ***It is at liberty to exercise these powers in the same way and to the same extent as individuals or private corporations*** and it is settled by a long line of decisions of the courts of this state that the ownership and operation of public utilities, such as . . . electric light plants . . . ***is not a governmental function but is proprietary in its nature and constitutes a business or corporate function of the city***.[24]

Today in Texas, the provision of public utility service by a municipality remains a proprietary or corporate function.[25] There is no doubt that the Texas Legislature is entitled to restrict or prohibit the powers of its political subdivisions. Here, however, the restrictions on a city's ability to provide telecommunications services have the same effect as restrictions on private entities.

The Texas Comptroller of Public Accounts, in a 2003 report, linked telecommunications services and economic development, declaring Texas' ban on municipalities and municipal electric companies an impediment to development of modern telecommunications services.[26] The Comptroller noted that "local telecommunications providers have demonstrated an apparent lack of interest because of legitimate concerns of profitability."[27] The Texas PUC recognizes that due to the comprehensive prohibition on local government from providing telecommunications services, "in a rural area if the ILEC does not initiate rollout of advanced services, rural residents may be challenged to find an alternate provider."[28] The PUC recommended a "narrow exception" that would allow rural municipal governments to build their own telecommunications

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[24] *Id.* (emphasis added).

[25] TEX. CIV. PRAC. & REM. CODE ANN., § 101.0215 (Vernon Supp. 2003).

[26] Carol Keeton Strayhorn, Texas Comptroller of Public Accounts, *Limited Government, Unlimited Opportunity*, "Increase the Availability of Broadband Interest Services in Rural Areas," at 2-4 (Jan. 2003).

[27] *Id.* at 4.

[28] Report to the 77th Texas Legislature, *Availability of Advanced Services in Rural and High Cost Areas*, Public Utility Comm'n of Texas, January 2001 at 69.

infrastructure and provide advanced services.[29] The PUC's suggestion went unheeded by the Legislature.

In the Texas PUC's report to the state Legislature in 2003, the plight of rural residents was made clear. The Texas Commission reported that as of June 30, 2002, incumbent local exchange companies still controlled 84% of the rural access lines.[30] Competitive local exchange companies "obtained more lines in urban areas, primarily in downtown and other business districts. This could be attributed to high investment costs and small customer bases in rural areas, resulting in smaller profit margins."[31] In many rural counties in Texas there are zero to few competitive local exchange company lines.[32] Similarly, there are numerous Texas counties that have a single or no broadband provider.[33] SBC's goal of providing DSL service to 80% of its customers based in Texas has been scaled back to 58% and the Company "announced a further slow down in towns with lower population densities."[34] As of the fourth quarter of 2001, 94% of SBC's DSL deployment in Texas is in urban areas.[35]

The Congress of the United States has determined that the nation's telecommunications needs are best served through competition. To ensure real competition, Congress has provided that a state may not prohibit "any entity" from providing telecommunications services. Missouri, Texas and others, however, have restricted competition by prohibiting public entities from providing such services. Petitioners' briefs, as well as those that support Petitioners, are eerily silent on the question of who is going to serve in those areas where the profit incentive is absent. Adoption of Petitioners' suggested interpretation of the 1996 Act ensures that lower prices, higher quality service, and the rapid deployment of technologically-advanced services will remain out of the grasp of many Americans.

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[29] *Id.*

[30] Report to the 78th Texas Legislature, *Scope of Competition in Telecommunications Markets of Texas*, Public Utility Comm'n of Texas, January 2003 at 24.

[31] *Id.* at 25.

[32] *Id.* at 26.

[33] *Id.* at 33, Fig. 20.

[34] *Id.* at 35.

[35] *Id.*

II. The Participation of Local Governments Can Realize Congress' Goal Of True Competition.

A. The Experience Of the Electric Utility Industry Is Instructive.

Petitioners could use a history lesson. It is an incredible American success story that the availability of reliable, affordable electric energy "changed the very fabric of every day life on the farms and ranches of rural America."[36] Universal electric service would never have developed on a timely basis without the development of municipally-owned systems and the creation of rural electric coops.

The development of the telecommunications industry is startlingly similar to that of the electric utility industry. American cities began enjoying the benefits of electric power soon after Thomas Edison started operating the first central station electric system in New York City in 1882.[37] However, the privately-owned utilities restricted service to larger cities, commercial businesses, and wealthy individuals.[38] Consequently, by 1890 more than 150 towns operated their own power systems.[39] Early consumer-owned systems often charged half the price of the private companies so that "common people gained access to the miracle of electric lights, while in the other cities only the wealthy could afford to switch from traditional gas or kerosene lamps, or commercial businesses faced higher prices."[40]

Gaps in service by the IOUs were filled by municipal systems in the large cities, as well. Detroit, for example, formed its own system to serve stores and homes of common people, charging prices 50% lower than the private company.[41] Interestingly, it was the leaders of the private electric utilities that

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[36] *People—Their Power, The Rural Electric Fact Book*, National Rural Electric Cooperative Association at 1-2 (1980).
[37] *Id.* at 4.
[38] R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* at 32-38 (1986).
[39] *American Public Power Association: A History* at 2.
[40] *Power Struggle* at 32.
[41] *Id.* at 32-38.

opposed free enterprise and competition and proposed that franchises be granted to single entities.[42]

Rural Americans were kept in the dark for nearly half a century:

> As late as the mid-1930s, nine out of ten rural homes were without electric service. The farmer milked his cows by hand in the dim light of a kerosene lantern. His wife was a slave to the wood range and washboard. The children pumped water by hand from a well in the yard and carried it into the house and barn by the bucketful. Ice cut from a pond in winter and stored underground was the only means for keeping food fresh. Outdoor privies were standard 'conveniences' for rural living, and they were a health hazard.
>
> If the 'good old days' of rural life four decades or more ago are remembered with some nostalgia, they also should be remembered for their primitive conditions and the burden of hand chores which had changed but little since Colonial times.
>
> The unavailability of electricity in rural areas kept their economies tied entirely and exclusively to agriculture. Factories and business, of course, preferred to locate in the cities where electric power was easily acquired. If a rural person wanted more income than farming offered, he had no choice but to move to the city – because that's where the jobs were.[43]

President Roosevelt issued Executive Order 7037 on May 11, 1935 establishing the Rural Electrification Administration and on May 20, 1936, the Rural Electrification Act of 1936 was signed into law establishing the Rural Electrification Administration as the federal agency through which low interest loans would be made available for the construction of necessary infrastructure. Only when private utilities failed to take advantage of the loan

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[42] *Id.* at 38-42.
[43] *People—Their Power* at 4.

opportunities was the formation of electric cooperatives encouraged.[44]

Not surprisingly, huge areas of Texas had gone unserved by the for-profit electric companies. Today, 65 rural electric distribution cooperatives in Texas with more than 296,000 miles of lines provide service to 1.5 million meters in 240 of Texas' 254 counties. As previously noted, it was reported to the FCC that 75 towns and cities in Texas own and operate their own electric utility or electric distribution system serving 2.5 million Texans. Local participation has meant reliable service and lower rates. The electric rates charged by electric cooperatives and municipally-owned electric systems in Texas are lower than almost all rates charged by the investor-owned utilities (IOUs):

[44] *Id.*

Average Bill Comparison[45]

June 2003 – Residential – 1,000 kWh

Central Power & Light (IOU)	$110.33
Texas-New Mexico Power (IOU)	$107.62
West Texas Utilities (IOU)	$107.33
El Paso Electric (IOU)	$104.97
CenterPoint (Houston) (IOU)	$101.46
TXU (Dallas) (IOU)	$100.72
Tri-County EC (Coop)	$96.25
CPS (San Antonio) (Muni)	$93.81
San Patricio EC (Coop)	$90.86
Entergy Gulf States (IOU)	$90.60
Nueces EC (Coop)	$87.14
Magic Valley EC (Coop)	$82.47
Austin Energy (City of Austin) (Muni)	$80.59
South Plains EC (Coop)	$77.20
Victoria EC (Coop)	$76.42
Kerrville PUB (Muni)	$72.19
Southwestern Electric Power (IOU)	$72.18
Guadalupe Valley EC (Coop)	$71.57
Bluebonnet EC (Coop)	$69.50
City of San Marcos (Muni)	$69.23
Southwestern Public Service (IOU)	$65.69
Upshur-Rural EC (Coop)	$63.95

Public participation in the provision of electricity through electric coops and municipally-owned systems is an unqualified success in Texas and throughout the United States. Local governments have ensured the provision of reliable, low cost power in areas where the private companies would not serve. The

[45] Sources: Public Utility Commission of Texas and City of Austin, d/b/a Austin Energy.

Missouri and Texas laws banning municipalities from providing telecommunications services where others refuse to serve prevents a similar success story in the telecommunications arena.

Today, the cavalier attitude of the early electric power industry is shocking. The electric industry viewed electrification as "a series of markets that could best be exploited in a particular sequence."[46] In a July 1935 report, utility company executives asserted that "there are very few farms requiring electricity for major farm operations that are not now served."[47]

This same "let them eat cake" attitude prevails today among the incumbent telephone companies. When the Mayor's Task Force in Abilene brought government, business, and educational leaders together to identify and plan for the advanced telecommunications system necessary to allow Abilene to grow, prosper, and compete, the incumbent telephone company simply said "no." Southwestern Bell decided that its network "...meets the needs of the Abilene community today and will tomorrow."[48] When Abilene appealed to the FCC for preemption so it could help itself, SWB arrogantly informed the FCC that it had already invested sufficient sums in Abilene.[49] It is more than ironic that Southwestern Bell, which refused to provide the infrastructure Abilene's government, education and business leaders determined would be necessary, is now before this Court arguing that cities and towns should go without before public entities should be allowed to fill in the digital divide.[50] SWB's position would make the electric utility executives of the 1930's proud.

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[46] D. Nye, *Electrifying America* at 26-27 (1990).

[47] *People, Their Power* at 7.

[48] SWB Regional President letter to the Abilene Mayor at 2 (Oct. 23, 1996).

[49] *In the Matter of City of Abilene*, FCC 97-346, SWB Comments at 5.

[50] SWB's goal is not competition but protection from competition. It has established a reputation for obstructing competition. In 1998, Consumers Union and the Consumer Federation of America urged the FCC to block a proposed merger between SBC and Ameritech. These groups warned of Southwestern Bell's "particularly bad record on local competition." *See,* Consumers Union Press Release, October 15, 1998. As late as 1998, "...competitors have taken less than 1 percent of the market from the Bell." *Id.* According to Consumers Union, "they have thrown every barrier imaginable to competition, in particular with SBC earning a

B. Congress Understood The Ability And Desire Of Local Governments To Participate In Competition.

One of the principal issues in the U.S. Presidential election in 1932 was the provision of electricity. Soon-to-be President Roosevelt knew the importance of local governments to real choice and lower rates:

> [W]here a community -- a city, or a county, or a district -- is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basis right, as one of its functions of government ... to set up ... its own governmentally owned and operated service. ... [t]he very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a 'birch rod' in the cupboard, to be taken out and used only when the 'child' gets beyond the point where more scolding does no good.[51]

Clearly, Congress was aware of the history of the electric industry when enacting the 1996 Act. Congress, too, understood

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national reputation as the Baby Bell most hostile to competitors." *Id.* Texas Public Utility Commissioners bemoaned Southwestern Bell's "lack of cooperation with customers and evidence of behavior which obstructs competitive entry." Transcript of Open Meeting, May 21, 1998, pages 186-208. The Texas Commission denied SWB's request to enter the long distance market based on the fact that competitors had captured only a "miniscule" number of business and residential customers in Texas. *Id.* Two of the Commissioners called for SWB to fundamentally change its corporate culture from the top to bottom. *Id.* SBC Communication was fined $6 million by the FCC for "willfully and repeatedly" failing to give competitors full access to its networks. *See,* San Antonio Express-News, October 10, 2002.

[51] Franklin Delano Roosevelt, campaign address on public utilities and development of hydro-electric power, delivered in Portland, Oregon, Sept. 21, 1932.

that local governments are uniquely positioned to enter the competitive market. Congress most certainly had knowledge of the benefits public entities could bring by filling in the gap in competition. Congress has seen that public participation lowers rates and enhances services. In this context, it is easy to see why Congress used the phrase "any entity" rather than "any private entity."

There is no doubt that entry into the telecommunications field by municipalities and municipally-owned electric utilities would promote competition and help meet the objectives of Congress.[52] The FCC admitted that to be the case in the *Abilene*

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[52] In those states without comprehensive bans on municipalities, the small cities are taking charge. *See,* Testimony of William J. Ray on Behalf of the American Public Power Association, Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. 351, 355-356 (1994). Glasgow, Kentucky's 13,000 residents have a choice of telephone service from GTE or Glasgow Electric. "The people of Glasgow won't have to wait to be connected to the information superhighway. They're already enjoying the benefits of a two-way, digital, broadband communications system. And it was made possible by the municipally owned electric system." As a result of the public system, the private cable TV company "decided to drop its rates by roughly 50 percent and improve its service, too." On Sept. 26, 2003, the American Public Power Association and Fiber-to-the-Home (FTTH) Council presented a briefing to Congress in which local authorities from places such as Provo, Utah, Bristol, Virginia, and Kutztown, Pennsylvania reported that public utility departments were offering a wide variety of telecommunications services. As a result, tech-oriented businesses were considering establishing operations in their communities. Kutztown's utility department took over the fiber loop when no private company showed an interest and the city provides cable TV, telephone and FTTH services. *See,* Telecommunications Reports Daily, *Officials: Broadband Investments Pay Off for Localities* (Sept. 26, 2003); www.tr.com. In the State of Washington, the City of Cheney has installed fiber-to-the-home technology to its residents and businesses causing the mayor to declare that "high-bandwidth services to our citizens helps us attract new businesses, create new jobs, and ensure our residents have access to broadband services enabled by FTTH technology." *See,* Light Reading-Networking the Telecom Industry, *FTTH Council Applauds Supremes* (June 25, 2003); www.lightreading.com. According to the Fiber-to-the-Home Council, 94 communities in 26 states have access to fiber to home with municipalities becoming the "feature players

proceeding: "[M]unicipal entry can bring significant benefits by making additional facilities available for the provision of competitive services."[53] In the case at bar, the FCC concedes again that, "the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities."[54]

The lessons of history are ignored at one's peril.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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in North America's fiber rollout agenda," including 80 local governments in Ohio providing broadband or cable service by their utility departments. *See,* Broadband Reports.com, *Bells Absent (so far) in Fiber Push* (Oct. 7, 2003).

[53] *In the Matter of City of Abilene*, FCC 97-346, Order at §190 (Oct. 1, 1997).

[54] *Brief for the Federal Petitioners* at 7.

Abernathy
Addison
Alamo
Allen
Andrews
Arlington
Austin
Balcones Heights
Belton
Big Spring
Bowie
Breckenridge
Brenham
Brookside Village
Brownfield
Brownwood
Buffalo
Burkburnett
Canyon
Carrollton
Cedar Hill
Center
Cisco
Clear Lake Shores
Cleburne
College Station
Conroe
Corpus Christi
Cottonwood Shores
Crockett
Dallas
Denison
Dickinson
El Lago
Electra
Fairview
Flower Mound
Fort Worth
Fredericksburg
Friendswood
Georgetown
Grand Prairie
Grapevine
Greenville
Gregory
Groves
Harlingen
Henrietta
Hewitt
Huntsville
Irving
Jacinto City
Jamaica Beach
Kilgore
LaGrange
La Joya
Lampasas
Lancaster
Laredo
League City
Levelland
Lewisville
Longview
Los Fresnos
McAllen
Mexia
Midlothian
Missouri City
Navasota
Nolanville
North Richland Hills
Palacios
Pampa
Paris
Pearsall
Plainview
Plano
Port Neches
Ralls
Refugio
Reno
Richardson
River Oaks
Rosenberg
San Marcos
San Saba
Selma
Seminole
Seymour
Smithville
Snyder
South Padre Island
Spearman

Stephenville
Sugar Land
Sunset Valley
Taylor Lake Village
Terrell
The Colony
Thompsons
Timpson
Town of Westlake
Trophy Club
Tyler
University Park
Victoria
Waxahachie
Webster